



NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Special Procedural Rules Governing Periods When the National Labor Relations Board Lacks a Quorum of Members

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board is revising its rules governing the consideration of certain pleadings that ordinarily require action by a quorum of at least three Board Members. The revisions are being adopted to facilitate, insofar as it is possible, the normal functioning of the Agency during periods when the number of Board members falls below three, the number required to establish a quorum of the Board. The effect of the revisions is to provide the public with avenues for resolving certain issues, while deferring full review by the Board until a quorum has been restored.

DATES: Effective December 14, 2011

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Room 11600, Washington, DC 20570. Telephone (202) 273-1067 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The National Labor Relations Board is revising its rules governing the consideration of certain pleadings that ordinarily require action by a quorum of at least three Board Members. The revisions are being adopted to facilitate, insofar as it is possible, the normal functioning of the Agency during periods when the number of Board members falls below three, the number required to establish a quorum of the Board. See 29 U.S.C. 153(b); *New Process Steel v. NLRB*, --- U.S. ---, 130 S.Ct. 2635 (2010). No Notice of Proposed Rulemaking (NPRM) is required with respect to this rules revision, as it falls under the Administrative Procedure Act's exception to the NPRM requirement for regulatory actions involving agency organization, procedure, or practice. See 5 U.S.C. 553.

At present, the rules of the National Labor Relations Board (NLRB) provide only for the adjudication of cases and the issuance of decisions by the Board when it is composed of three or more members, which constitutes the Congressionally-designated quorum of the Board. In *New Process Steel v. NLRB*, *supra*, 130 S. Ct. 2635, the Supreme Court held that Congress empowered the Board to delegate its powers to no fewer than three members, and that, to maintain a valid quorum, a membership of three must be maintained. *Id.* at 2640. It can be anticipated that, from time to time, the number of individuals appointed by the President and confirmed by Congress to serve as members of the National Labor Relations Board may fall below three. Thus, the Board has determined that the purposes of the National Labor Relations Act will best be served, and the Board's Congressional mandate will best be carried out,

if its rules were revised to refer, under those circumstances only, certain motions and appeals to other offices of the Board, while preserving for the parties the right to ultimate review by the Board when a quorum is restored. In this regard, the Board has identified certain classes of disputes that are amendable to processing through other Board offices; i.e., Motions for Summary Judgment, Motions for Default Judgment, Motions for Dismissal of Complaints, and requests for permission to file special appeals will be referred to the Chief Administrative Law Judge for ruling, and administrative and procedural motions will be referred to the Executive Secretary for ruling. In all cases of such referrals, parties will retain the right to full Board review by filing a request for review or exceptions to the ruling at the appropriate time. Normal time limits for filing will apply, and the case will be considered on its merits by the Board upon restoration of a quorum.

It is anticipated that these changes in the rules will serve the interest of the public and the parties in the speedy resolution of disputes, where that resolution is possible, as well as in the litigation of cases before administrative law judges with as few disruptions as possible. In addition, the Board anticipates that, as in some cases the parties will determine that no exception is warranted, these revisions may serve to reduce the backlog of cases that the Board will face when a quorum is restored.

Executive Order 12866

The regulatory review provisions of Executive Order 12866 do not apply to independent regulatory agencies. However, even if they did, the proposed changes in the Board's rules would not be classified as "significant rules" under Section 6 of Executive Order 12866, because they will not result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or foreign markets. Accordingly, no regulatory impact assessment is required.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for procedural rules, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) pertaining to regulatory flexibility analysis do not apply to these rules. However, even if the Regulatory Flexibility Act were to apply, the NLRB certifies that these rules will not have a significant economic impact on a substantial number of small business entities as they merely provide parties with avenues for expeditiously pursuing and defending claims before the Board under certain narrow circumstances.

Paperwork Reduction Act

These rules are not subject to Section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501) since they do not contain any new information collection requirements.

Small Business Regulatory Enforcement Fairness Act

Because these rules relate to Agency procedure and practice and merely modify the Agency's internal processing of certain motions in narrow circumstances, the Board has determined that the Congressional review

provisions of the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801) do not apply.

List of Subjects in 29 CFR Part 102

Administrative practice and procedure; Labor-management relations.

To provide for the normal operation of the Board during periods when the number of Board members is insufficient to constitute a quorum, the Board amends 29 CFR part 102 as follows:

PART 102 – RULES AND REGULATIONS, SERIES 8

1. The authority citation for 29 CFR part 102 continues to read as follows:

Authority: Section 6, National Labor Relations Act, as amended (29 U.S.C. 151, 156). Section 102.117 also issued under Section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)). Sections 102.143 through 102.155 also issued under Section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

2. Add subpart X to read as follows:

Subpart X—Special Procedures When the Board Lacks a Quorum

Sec.

102.178 Normal operations should continue.

102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.

102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.

102.181 Administrative and procedural requests referred to Executive Secretary.

Subpart X—Special Procedures When the Board Lacks a Quorum

§ 102.178 Normal operations should continue.

The policy of the National Labor Relations Board is that during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law.

§ 102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, all motions for default judgment, summary judgment, or dismissal filed or pending pursuant to § 102.50 of this part shall be referred to the Chief Administrative Law Judge in Washington, D.C., for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, shall not be appealed directly to the Board, but shall be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46 of this part.

§ 102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, any request for special permission to appeal filed or pending pursuant to § 102.26 of this part shall be referred to the Chief Administrative Law Judge in Washington, D.C., for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, shall not be appealed directly to the Board, but shall be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46.

§ 102.181 Administrative and procedural requests referred to Executive Secretary.

During any period when the Board lacks a quorum, administrative and procedural requests that would normally be filed with the Office of the Executive Secretary for decision by the Board prior to the filing of a request for review under § 102.67 of this part, or exceptions under §§ 102.46 and 102.69 of this part, shall be referred to the Executive Secretary for ruling. Such rulings by the Executive Secretary, and orders in connection therewith, shall not be appealed directly to the Board, but shall be considered by the Board if such matters are raised by a party in its request for review or exceptions.

Signed in Washington, DC, December 8, 2011

Mark Gaston Pearce

Chairman

[FR Doc. 2011-32085 Filed 12/13/2011 at 8:45 am; Publication Date: 12/14/2011]